No. 3696

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHANG SIM and CHANG YET,

Appellants.

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

REPLY BRIEF FOR APPELLEE

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The appellants herein are applicants for admission at the Port of San Francisco as citizens of the United States, claiming to be the foreign-born sons of C. Wai Tong, whose citizenship is conceded.

The burden of proof in this case, like all others, is upon appellants.

C. Wai Tong, the alleged father, was born in China November 20, 1857, and became a naturalized subject of the Kingdom of Hawaii July 19, 1892,

and, being a citizen of the Republic of Hawaii, on the 12th day of August, 1898, he became a citizen of the United States under the Act of April 30, 1900.

The appellant Chang Sim was born in China September 1, 1894, and Chang Yet was also born in China January 7, 1888.

As the alleged father did not become a citizen of the United States until April 30, 1900, and both appellants were born before that date, neither can claim citizenship under the provisions of Section 1993 of the Revised Statutes which provide: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States." The Act of April 30, 1900, provides: "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

As the alleged father C. Wai Tong was not a citizen of the United States at the time of the birth of either of the appellants, they can not claim citizenship under Section 1993 of the Revised Statutes.

The question naturally follows were the appellants, by reason of the naturalization of their alleged father, citizens of the Republic of Hawaii on the 12th day of August, 1898, and therefore citizens of the United States under the Act of April 30, 1900.

It is contended by counsel for petitioners that upon the naturalization of the alleged father in Hawaii in 1892, his wife and minor sons, *ipso facto*, became citizens of Hawaii, although none of them, so far as the record shows, ever lived in Hawaii.

We have made a careful search of all available Hawaiian laws and fail to find anything in support of appellants' contention.

Our own naturalization laws provide that the children of persons duly naturalized under any of the laws of the United States, being under the age of twenty-one years at the time of their parents being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States (R. S. 2172). As neither appellant was dwelling in Hawaii at the time their alleged father was naturalized and have never lived there, they could not claim Hawaiian citizenship even though Hawaii had a statute similar in all respects to the section just before quoted; but, so far as we have been able to ascertain, there was never such a law in Hawaii.

Article VIII of the revised laws of the Kingdom of Hawaii, after prescribing the qualifications of persons entitled to naturalization and prescribing the oath to be taken, provides in part as follows:

> "432. Every foreigner so naturalized, shall be deemed to all intents and purposes a native of the Hawaiian Islands, be amenable only to the laws of this Kingdom, and to the authority and control thereof, be entitled to the protection

of said laws, and be no longer amenable to his native sovereign while residing in this Kingdom, nor entitled to resort to his native country for protection or intervention. He shall be amenable, for every such resort, to the pains and penalties annexed to rebellion by the Criminal Code. And every foreigner so naturalized, shall be entitled to all the rights, privileges and immunities of an Hawaiian subject."

(Revised Laws of Hawaii 1884, Page 105.)

From this it appears that such naturalized persons were to be deemed natives or subjects of Hawaii "while residing in the Kingdom." This being the case, we fail to see how by any rule or fiction of law the wife and children of a naturalized subject of that Kingdom, who themselves never have resided in the Kingdom, can be regarded as natives or subjects of that Kingdom.

The constitution of the Republic of Hawaii adopted July 3, 1894, is in part as follows:

"Article 17.—Citizenship.

"Section 1. All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof."

"Article 18.—Naturalization.

"Section 1. The Naturalization of Aliens shall be exclusively within the jurisdiction of the Justices of the Supreme Court.

The procedure shall be such as may be provided by law.

Section 2. An alien may be admitted to citizenship upon the following conditions, viz:

1. He shall have resided in the Hawaiian Islands for not less than two years.

2. He must intend to become a permanent citizen of the republic.

3. He shall be able understandingly to read, write and speak the English language.

4. He shall be able intelligently to explain, in his own words, in the English language, the general meaning and intent of any article or articles of this Constitution.

5. He shall be a citizen or subject of a country having express treaty stipulations with the Republic of Hawaii concerning naturalization.

6. He shall be of good moral character and not a refugee from justice.

7. He shall be engaged in some lawful business or employment or have some other lawful means of support.

8. He shall be the owner in his own right of property in the Republic of the value of not less than Two Hundred Dollars over and above all encumbrances.

9. He shall have taken the oath prescribed in Article 101 of this Constitution and an oath abjuring allegiance to the Government of his native land or that under which he has heretofore been naturalized, and of allegiance to the Republic of Hawaii.

10. He shall make written application, verified by oath, to a Justice of the Supreme Court, setting forth his possession of and compliance

with all of the foregoing qualifications and requirements, and shall prove the same to the satisfaction of such Justice."

(Fundamental Law of Hawaii," Page 205-206.)

We find nothing in the above which can be construed in any manner as supporting the contention of counsel for petitioners that appellants herein were citizens of either the Kingdom or the Republic of Hawaii. On Page 6 of appellants' reply brief there is quoted Sections 1109 and 1110 of the Civil laws of Hawaii published in 1897.

Section 1109 provides that "the common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage * * *."

We do not agree with counsel for appellants in his interpretation of what constitutes the common law. It is claimed by him that the various statutes, both of England and the United States, conferring citizenship upon children born abroad, are to be considered as a part of the common law. A definition of the common law, as we interpret it, is found in the case of *Western Union Telegraph Company* vs. *Call Publishing Company,* 181 U. S. 92-102, 45 L. ed. 765-770. In that case the Court, speaking through his Honor Mr. Justice Brewer, says:

"What is the common law? According to Kent: 'The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.' 1 Kent, Com. 471. As Blackstone says: 'Whence it is that in our law the goodness of a custom depends upon its having been used time *out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this Kingdom. This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole Kingdom, and form the common law, in its stricter and more usual signification.' 1 Bl. Com. 67. In Black's Law Dictionary, page 232, it is thus defined: 'As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England."

Mr. Frederick Van Dyne, formerly Assistant Solicitor of the Department of State of the United

States, has this to say upon the common law doctrine:

> "1. Common-law doctrine.—There is no uniform rule of international law covering the subject of citizenship. Every nation determines for itself who shall, and who shall not, be its citizens. According to the law of some states, citizenship by birth depends upon the place of birth. This is the jus soli, or common-law doctrine. According to the law of other states, citizenship depends upon the nationality of the parents. This is the jus sanguinis,—sometimes erroneously termed the doctrine of the law of nations, because it obtains in many countries. In some countries both elements exist, the one or the other, however, predominating. By the law of the United States, citizenship depends, generally, on the place of birth; nevertheless the children of citizens, born out of the jurisdiction of the United States, are also citizens. The existence of these two doctrines, side by side, in this country, is the cause of much of the confusion which has arisen in relation to citizenship in the United States. Formerly, the lack of any definition of citizenship in our fundamental law and in our statutes further complicated the matter; and the somewhat ambiguous language employed in supplying this defect rendered it a debatable question whether or not it was intended to declare the common-law doctrine."
>
> ("Citizenship of the United States, Van Dyne, Page 3.)

It is the Government's contention that under the common law citizenship could only be acquired by

birth and that it was not until parliamentary or legislative action that citizenship could be acquired by naturalization or by reason of being born abroad to parents who were themselves citizens of a particular country. We find support of this contention in Cooley's Blackstone, as follows:

> "When I say, that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. *The common law, indeed, stood absolutely so,* with only a very few exceptions; so that a particular act of parliament became necessary after the restoration, (y) 'for the naturalization of children of his majesty's English subjects, born in foreign countries during the late troubles.' And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once. Yet the children of the king's ambassadors born abroad were always held to be natural subjects: (z) for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of postliminium: recovery) to be born under the king of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III, st. 2, that all children born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England;

> and accordingly it hath been so adjudged in behalf of merchants. (a) But by several more modern statutes (b) these restrictions are still farther taken off; so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue."
>
> ("Cooley's Blackstone," Fourth Edition, Vol. I, Page 316, *373.)

On page 9 of appellants' reply brief counsel quotes the statute 25 Edw. III, and the language of Mr. Justice Gray in the case of *United States vs. Wong Kim Ark,* 169 U. S. 649, 18 Sup. Ct. 456, wherein the Court said:

> "It has been pertinently observed that *'if* the Statute of Edward III had been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary.' "

This supports the Government's contention in this case that, according to the common law, children

born abroad of the subjects of Great Britain were not considered subjects of that Kingdom, and it was only after legislation conferring upon them the status of citizenship, that they were considered as such.

It is the Government's contention that the common law rule governed in such matters in the Kingdom and Republic of Hawaii and that in the absence of a particular statute showing that the appellants herein were considered to be citizens or subjects of either the Kingdom or the Republic of Hawaii, that they are not now entitled to admission to the United States as citizens thereof.

Respectfully submitted,

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